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No. 86-859

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

LAWRENCE J. KOVAC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that state rather than federal law should determine the validity of a search warrant obtained in connection with a joint federal-state criminal investigation.

1. Following a bench trial in the United States District Court for the District Court of Oregon, petitioner was convicted of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to four years' imprisonment.

Upon receiving information that petitioner was selling large quantities of cocaine from his home in Salem, Oregon, DEA Agent Donald Sims conducted surveillance of the residence for two weeks. On one occasion during that period, Sims and an officer of the Salem Police Department observed Catherine Robins, petitioner's sister-in-law and a probationary employee of the Salem Police Department, leave petitioner's home in her car. They stopped her and asked whether she had observed narcotics trafficking at petitioner's residence. After first

denying that she had observed any illegal activity, Robins agreed to accompany the agent and the officer to the Eugene, Oregon, office of the DEA, where she admitted that she had seen a plastic bag containing more than one ounce of marijuana in petitioner's home. Pet. App. A2-A3, A12.

An Oregon state police officer subsequently submitted an application to an Oregon state court for a warrant to search petitioner's residence. The application included an affidavit relating Robins' statement. After the warrant was issued, DEA agents and Oregon state police officers searched petitioner's home. In the course of the search, the officers found 1.6 pounds of cocaine and 1.3 pounds of marijuana. Pet. App. A3-A4, A16.

2. On appeal, petitioner argued that Oregon state law, rather than federal law, should have applied to determine the validity of the search warrant. Under Oregon law, he asserted, the warrant was invalid.

Without reaching the question whether the warrant was valid under Oregon law, the court of appeals concluded (Pet. App. A10-A12) that federal rather than state law governed the validity of the search warrant. The court noted that the federal officials "were clearly acting in concert with state officers in obtaining the information" that supported the search warrant for petitioner's home (Pet. App. A11). The officers and federal agents also acted in concert in executing the search warrant (*ibid.*). Accordingly, the court held, "whether the officials complied with state law is not relevant; the only question is whether the officials acted in compliance with federal law" (*id.* at A11-A12). The court then found the warrant to be valid under federal law (*id.* at A12-A16).[1]

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[1] Judge Reinhardt concurred in the result (Pet. App. A20-A30). He took issue with the majority's conclusion that prior Ninth Circuit decisions had settled the question whether federal law governed the validity of the search warrant (*id.* at A22-A25). He argued that the majority

3. Petitioner renews (Pet. 5-10) his claim that state rather than federal law should have applied to determine the validity of the search warrant. He contends (*id.* at 7-9) that the decision of the court of appeals conflicts with this Court's decision in *Miller* v. *United States,* 357 U.S. 301 (1958). The decision of the court of appeals, however, is correct and does not conflict with any decision of this Court or that of any other circuit. Further review is therefore unwarranted.

It has long been established that the lawfulness of a search for purposes of determining the admissibility of evidence in a federal court is a question of federal law. *E.g., Elkins* v. *United States,* 364 U.S. 206, 223-224 (1960); *United States* v. *Zemek,* 634 F.2d 1159, 1164 n.4 (9th Cir. 1980), cert. denied, 450 U.S. 985 (1981). Thus, upon concluding that the search warrant for petitioner's home complied with federal law (Pet. App. A15-A16)—a conclusion that petitioner does not contest—the court of appeals did not err in holding that it was irrelevant whether the warrant also satisfied the requirements of Oregon law (*id.* at A11-A12). Other courts of appeals have agreed with that holding, particularly where, as here, the search occurred in the course of a joint federal-state criminal investigation. See, *e.g., United States* v. *Rickus,* 737 F.2d 360, 363-364 (3d Cir. 1984); *United States* v. *Turner,* 558 F.2d 46, 49 (2d Cir. 1977); *United States* v. *Votteller,* 544 F.2d 1355, 1361 (6th Cir. 1976).

Contrary to petitioner's contention, the decision in this case does not conflict with this Court's decision in *Miller* v. *United States, supra.* The Court in *Miller* followed the earlier decision in *United States* v. *Di Re,* 332 U.S. 581 (1948), where the Court held that in the absence of an applicable federal statute, the lawfulness of a warrantless

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need not have resolved that issue, because the warrant could be upheld on two alternative grounds, one of which was that the warrant was valid under both Oregon and federal law (*id.* at A26-A29).

arrest is determined by the law of the state where the arrest takes place. Regardless of whether that rule is still valid,[2] it has never been extended to determine the lawfulness of searches. The lawfulness of searches, unlike the lawfulness of arrests, has always been a question of federal law when the evidence is offered in federal courts. See *United States* v. *Rickus,* 737 F.2d at 364 n.2 (emphasis in original) (holding that federal law governs validity of search warrant obtained in connection with joint federal-state criminal investigation and observing that "this case does not require us to assess the validity of an *arrest* by state officers. Thus, we need not address the rule set forth in *United States* v. *Di Re* * * *"). Accordingly, there is no conflict between the instant case and either *Miller* or *Di Re.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1987

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[2] The Court has never satisfactorily explained why the lawfulness of a search should be judged by federal standards, while the lawfulness of an arrest (and the admissibility of evidence that depends on the lawfulness of the arrest) should be judged by state standards. Several courts have suggested that *Di Re* may no longer be valid, in light of the Court's decision in *Elkins* and the development of a federal common law governing the lawfulness of arrests. See *United States* v. *Porter,* 701 F.2d 1158, 1165 (6th Cir.), cert. denied, 464 U.S. 1007 (1983); *United States* v. *Miller,* 452 F.2d 731, 733 (10th Cir. 1971), cert. denied, 407 U.S. 926 (1972).

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